IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4290 OF 2007.

1. Sou.Sitabai Bharat Chavan,
   Age:50 years, Occ.: Agriculture,
   R/o.H.No.793A, Govindpura,
   Pandharpur, Dist. Solapur.

2. Bharat Maruti Chavan,
   Age: 59 years, Occ.: Agriculture,
   R/o.H.No.793A, Govindpura,
   Pandharpur, Dist. Solapur. ... Petitioners.

Versus.

1. The Bruhan-Maharashtra Sugar
   Syndicate Ltd., Solapur,
   through its Power of Attorney
   Holder Shri S.G.Dandavte,
   Age: 34, Occ.: Service,
   residing at Shirpur, Taluka:
   Malshiras, Dist. Solapur.

2. Shivaji Shamrao Patil,
   since deceased through his
   heirs and legal representatives,

   2A) Smt.Sushila Shivajirao Patil,
   2B) Shri Raosaheb Shivajirao Patil,
   2C) Sou.Sundnad Balasaheb @
       Yeshwantrao Jagtap,
       All adults, residing at
       Kavathe Mahankal, Dist.Sangli.

3. Maruti Pandurang Chavan,
   since deceased through his
   heir and representative,

   3A. Shri Bhujang maruti Chavan,
       Adult, R/o. Suste, Taluka
       Pandharpur, Dist.Solapur.

4. Sou.Kalavati Maruti Chavan,
   (Dies during pendency).

5. Shivaji Dasharath Pawar,
   Age Adult, R/at Umbargaon,
   Tal: Pandharpur, Dist.Solapur. ... Respondents.

Shri G.S.Godbole for the Petitioners.

Shri K.B.Sonwalkar for the Respondent No.1.

Shri A.M.Kulkarni for Respondents Nos.2A to 2C.

CORAM : ABHAY S.OKA, J.

DATED : 2nd November, 2007.

ORAL JUDGMENT.:

1. Submissions of the learned Counsel appearing for the parties were heard on the last date. With a view to appreciate the said submissions, it will be necessary to refer to the facts of the case in brief.

2. The 1st Respondent is the original Plaintiff-decree holder, who filed a suit against the Petitioners and Respondents Nos 3 to 5 for recovery of a sum of Rs.2,22,726.26 ps. In the said suit compormise was arrived at. The Petitioners and Respondents Nos.3 to 5 agreed to keep a charge for the amounts payable to the 1st Respondent on land bearing Gat No.132A of village Kavthale, Taluka Pandharpur, Dist. Solapur.

3. In execution of the said decree, the land bearing Gat No.132A was sold under the orders of the Court. It is not necessary to refer to the details of the proceedings relating to sale considering the scope of the controversy involved in this petition. The 2nd

Respondent is the auction purchaser in whose favour the sale was confirmed. An application was filed by the Petitioners for setting aside the said sale made in favour of the 2nd Respondent. By judgment and order dated 18th October 2000 the said Application was allowed and the sale in favour of the 2nd Respondent was set aside. The 1st Respondent-decree holder preferred an Appeal against the said order. The said Appeal has been allowed by judgment and order dated 12th July 2006 by the learned Additional District Judge, Pandharpur and thus the order of sale confirmation in favour of the 2nd Respondent has been restored. The Petitioners have taken exception to the said order passed in Appeal by filing the present writ petition under Article 227 of the Constitution of India. It must be stated here that the order of the trial Court dated 18th October 2000 was challenged by the Respondents Nos.2A to 2C in this Court by preferring an Appeal from Order No.129 of 2002. In the said Appeal notice before admission was issued. Thereafter the said Appeal was dismissed for non-prosecution as the Appellants therein failed to take any action for bringing on record the legal representatives of the deceased Respondent No.4 in the said Appeal. There is an application being Civil Application No.994 of 2007 pending in the said Appeal for restoration of the Appeal from Order.

4. Before dealing with the merits of the order passed by the Appellate Court, two questions will have to be decided. The first question is whether the Appeal preferred by the 1st Respondent was maintainable againt the order dated 18th October 2000 and the second question is if the Appeal was maintainable which is the forum of the appeal.

5. It will be necessary to refer to the Application filed by the present Respondents Nos.2A to 2C for setting aside the dismissal of the Appeal. The said Application was filed by invoking Rule 90 of Order XXI of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code"). Rule 90 reads thus:

> "90.Application to set aside sale on ground of irregularity or fraud. - (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution or assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.
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> (2) No sale shall be set aside on the ground

of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.- The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

Rule 89 of Order XXI of the said Code also deals with an application for setting aside the sale of immoveable property on deposit of the requisite amount. Rule 91 contemplates an application for setting aside the sale on the ground of the purchaser having no saleable interest. Rule 92 which was in force at the relevant time reads thus:

"92. Sale when to become absolute or be set aside. - (1) Where no application is made under

rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute;

. (Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.)

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, (or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale;

. Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered".

6. An Appeal is provided under clause (j) of Rule (1) of Order XLIII against an order under Rule 92 of Order XXI of setting aside or refusing to set aside sale. The question is whether the order passed by the trial Court in the present case can be treated as an order under Rule 92 of Order XXI of the said Code. The learned Counsel appearing for Respondents Nos.2A to 2C

in the Writ Petition has invited my attention to a decision of the Allahabad High Court in the case of Kedar Nath v/s. Purushottam Das Banarsi Das, (AIR 1966 Allahabad page 189) in support of the contention that an Appeal will lie in such a case under the said clause (j). On a plain reading of Rule 89, Rule 90, and Rule 92 and especially sub-rule (2) and sub-rule (3) of Rule 92 it appears that Rules 89 and 90 provide for a remedy of applying for setting aside the sale on the grounds incorporated therein and Rule 92 confers a power on the Court either to allow the application under Rule 89 or Rule 90 by setting aside the sale or to reject the application. The consequences of rejection of the Application are provided in Sub-Rule (1) of Rule 92 by providing that on rejection of the Application, the Court shall make an order confirming the sale and thereafter the sale shall become absolute.

7. Clause (j) of Rule (1) of Order LXIII provides for an Appeal from an order under Rule 92 of setting aside or refusing to set aside the sale. Obviously Rule 92 confers a power on the Court to deal with the applications under Rule 89, Rule 90 or Rule 91 and to pass an order either of setting aside the sale or of refusing to set aside the sale. The orders which are passed on Applications under Rule 89, Rule 90 and Rule 91 are obviously orders passed under Rule 92. If such

an interpretation is not given to the provisions of Rules 89 to 92, the provision relation to Appeal made in clause (j) will become obsolete.

8. Therefore, the order passed by the trial Court in the present case on 18th October 2000 will have to be treated as an order under Rule 92 of Order XXI of the said Code which is an appealable order as stated above.

9. The claim in the suit filed by the 1st Respondent is admittedly for recovery of a sum of Rs.2 lakhs and more. Obviously the claim for jurisdiction of the said suit is more than Rs.2 lakhs. In view of the provisions of Bombay Civil Courts Act, 1869 the forum of Appeal will not be the District Court. The forum of Appeal will be governed by the valuation for jurisdiction in the original suit in which the decree is passed. Thus the Appeal preferred by the 1st Respondent before the District Court was not maintainable and the forum of appeal was this Court. Only on this ground, the impugned order is required to be set aside.

10. It is true that this aspect was completely glossed over by the Appellate Court as well as by the parties. The only logical course open is to set aside the order of the Appellate Court and to direct the Appellate Court to return the Memorandum of Appeal for

presentation to this Court. Shri Sonwalkar appearing for the 1st Respondent states that the 1st Respondent in such contingency desires to prefer an Appeal to this Court.

11. This petition arises out of the order passed in execution proceedings of a decree which is passed long back. Instead of putting the parties to further expense and undue harassment, I propose to direct the District Court to transfer the Appeal from order to this Court. In any case an application for restoration of the Appeal from order filed by the Respondents Nos.2A to 2C against the same order is also pending in this Court.

12. Hence the following order is passed:

(i) The impugned judgment and order dated 12th July 2006 passed in Civil Misc. Appeal No.98 of 2001 is quashed and set aside and the said Appeal is restored to file.

(ii) The said Civil Miscellaneous Appeal No.98 of 2001 pending in the Court of the Additional District Court at Pandharpur is hereby withdrawn from that Court and is transferred to this Court.

(iii) After receiving the papers of the concerned Appeal from the District Court, the Registry will place the same before the appropriate Court. Writ to go down immediately.

Judge.